

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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)	
Extending Wireless Telecommunications)	WT Docket No. 99-266
Services to Tribal Lands)	
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)	

Comments of the Office of Advocacy, U.S. Small Business Administration

The Office of Advocacy of the United States Small Business Administration (“Advocacy”)¹ respectfully submits these Comments to the *Notice of Proposed Rulemaking* (“*NPRM*”) and initial regulatory flexibility analysis (“IRFA”) in the above-captioned proceeding.² The Federal Communications Commission (“Commission”) is proposing rules designed to bring basic telephone services to unserved Native American tribal lands and other unserved areas through wireless local loop services and other wireless technologies. The Commission seeks comment on whether wireless technologies can substitute for traditional wireline technologies in supporting basic fixed telephony in areas currently suffering very low telephone penetration levels. Advocacy applauds this effort and agrees that no American should be without basic telephone services. But the Commission’s proposal promotes provision of these services by large business, to the detriment of small business. This results from an inadequate regulatory flexibility analysis.

¹ Congress established Advocacy in 1976 by Pub. L. No. 94-305 to represent the views and interests of small business within the Federal government. (Codified as amended at 15 U.S.C. §§ 634 a-g, 637.) Advocacy serves as a focal point for concerns regarding the government’s policies as they affect small business, develops proposals for changes in Federal agencies’ policies, and communicates these proposals to the agencies. (*See* 15 U.S.C. § 634c(1)-(4).) Advocacy also monitors agency compliance with the RFA and reports this to Congress.

² *Extending Wireless Telecommunications Services to Tribal Lands, Notice of Proposed Rulemaking*, WT Docket No. 99-266, FCC 99-205 (rel. August 18, 1999); 64 Fed. Reg. 49,128 (1999).

The Commission proposes to lift transfer restrictions on C- and F-Block personal communications service (“PCS”) licenses. These restrictions preserve incentives designed to assure small business representation in the provision of PCS. The Commission has tentatively concluded that large businesses are more likely than small businesses to “have more of the resources necessary to build out on tribal lands and other unserved areas”.³ Advocacy questions this conclusion. The Commission provides no substantiation to justify its conclusion, and what little rationale the Commission gives ignores the many small and local telecommunications businesses that already serve this country’s rural communities. In light of this, why does the Commission assume that small business will not be able to use PCS spectrum to provide fixed telephony services to unserved areas? The Commission should not eliminate the restrictions on transfer that apply to PCS licenses subject to designated entity benefits unless it can provide credible justification for its conclusion that large businesses will likely “have more of the resources necessary to build out on tribal lands and other unserved areas”.

The Commission also proposes to offer bidding credits in future auctions to companies that commit to serve unserved areas, without regard to business size. The Commission fails to discuss whether this would give an unfair advantage to prospective big-money big-business bidders. Congress recognizes that small, minority, and women owned businesses do not have the ready access to capital enjoyed by large businesses.⁴ Therefore, Congress directs the Commission to provide incentives that would promote opportunities among small businesses.⁵ The Commission has borne Congress’s will in mind in developing designated entity provisions in past spectrum auctions. In applying such provisions to future auctions relating to unserved

³ *NPRM*, para 35.

⁴ 47 U.S.C. § 309(j)(3)(B).

⁵ See H.R. Rep. No. 103-111, at 254-55 (1993)

tribal lands, the Commission should consider an applicant's business size, as well as its commitment to providing service to unserved areas. The Commission should help assure that small businesses can compete in spectrum auctions on a level field, so they are in a position to compete in the marketplace.

The Commission's regulatory flexibility analysis fails to discuss adequately the impact that its designated entity proposals would have on small business, and fails to propose any alternatives that would minimize this impact while promoting the goal of bringing basic telephony to unserved areas. Small business is an innovative force in the American economy. Therefore, the Commission should not simply hand dominance of these niche markets to big business. The Commission's rules should encourage any interested carrier, large or small, to serve rural communities that lack basic telephony, without disadvantaging small business.

1. The Commission's Designated Entity Proposals Disadvantage Small Businesses

The Commission established incentives to encourage small business participation in PCS spectrum auctions by setting aside the C- and F-Blocks for small business participation. These incentives were designed to fulfill the statutory objectives of the Communications Act of 1934, as amended, of "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women".⁶ Congress recognizes that small businesses, minorities, and women-owned businesses do not have ready access to capital nor the resources to acquire

⁶ 47 U.S.C. § 309(j)(3)(B).

telecommunications licenses despite being competent to provide quality services.⁷ Therefore, Congress directs the Commission to consider special incentives to promote economic opportunities for these designated entities that would compensate for capital access problems.⁸

To prevent trafficking of licenses, the Commission prohibits the transfer of C- and F-Block PCS licenses from small businesses or “designated entities” (“DEs”) to non-DEs (*e.g.* large entities) during the first five years of the license term.⁹ In this proceeding, however, the Commission proposes to lift these restrictions. The Commission reasons that “it is likely that non-DEs will have more of the resources necessary to build out on tribal lands and other unserved areas, particularly in more remote areas.”¹⁰ This statement can be interpreted in one of two ways: first, as a truism, that large business has greater resources than small business, or second, that only large business would have the minimum resources needed to roll out fixed wireless services to areas that are unserved by basic telephony. Since large business generally has greater resources than small business, Advocacy understands the Commission to mean by this statement that small business, in the Commission’s view, essentially cannot provide these services. (The Commission presents no other rationale for removing DE transfer restrictions.)

The Commission offers no support for its apparent conclusion that only large businesses can bring telephony to unserved areas. And this conclusion ignores the many small businesses that have demonstrated a willingness and ability to serve rural areas, with both wired and

⁷ See H.R. Rep. No. 103-111, at 254-55 (1993) (“[U]nless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries. . . . One of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with ‘deep pockets’, and therefore have the wherewithal to participate in the bidding process.”).

⁸ *Id.* at 255.

⁹ *NPRM*, para 35.

¹⁰ *Id.*

wireless services.¹¹ Market realities may well have kept wired telephony services from low-income sparsely populated areas, but this does not mean that small businesses lack the capacity to provide these services. Common sense indicates that smaller local businesses would be better able and more inclined to respond to local rural needs than larger companies. Large companies may lack cultural and other connections to local communities, and have high overhead costs that may limit their flexibility in fashioning services that satisfy the particular needs of poor and under-served communities.

Without evidence that only large businesses are equipped to reach out to sparse communities that rebuts historical data, the Commission should not propose lifting its designated entity transfer restrictions. The Commission should not handicap small business when there is no evidence of any small business incapacity. Without cause, the Commission should not pave the path toward large business dominance of wireless local loop services.

Additionally, the Commission has inexplicably singled out PCS C- and F-Block licenses from other wireless services that are subject to designated entity transfer restrictions. For instance, the Commission fails to discuss DE restrictions on auctioned services such as local multipoint distribution service (“LMDS”)¹², which the Commission expects could provide fixed wireless services to tribal lands.¹³ Chairman Kennard has pointed out that 74% of the recently

¹¹ In 1996, about half of all rural communications establishments were operated by small businesses (fewer than 500 employees); these employed almost half of the total rural workforce. More than a third of these establishments employed fewer than twenty persons each. *See* Statistics of U.S. Business, Bureau of the Census, 1996.

¹² As with PCS, the Commission determined that DE benefits were necessary in the LMDS auction to help small business overcome disadvantages gaining capital required to compete for spectrum with very large entrenched communications companies. *See Rulemaking to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order*, CC Docket No. 92-297, FCC 97-82 (“*LMDS Second R&O*”), para. 348 (rel. March 13, 1997). The Commission requires repayment of bidding credits in case of transfer of a DE license to a non-DE entity. *Id.*, para 350.

¹³ *NPRM*, para 11.

auctioned LMDS spectrum was won by small business.¹⁴ Yet rightly, the Commission does not suggest that small LMDS licensees will be unable to provide wireless local loop services to sparsely populated tribal and other rural lands within their service areas. The Commission does not propose carving out these areas for transfer to large businesses, which may have greater resources. In light of this, it is curious that the Commission would single out the PCS C- and F-Blocks for transfer to large businesses. The Commission may have other motivations for wanting these licenses to go to large businesses. If so, the Commission does not state them. Its stated rationale makes no sense, and even less sense if applied solely to PCS C- and F-Block licensees and not other DE services.

The Commission also proposes granting designated entity benefits in future auctions to companies that agree to provide services to areas unserved by wired telephony, without regard to the business size. Presumably this decision is again based on the premise that only large businesses can provide these services. But the Commission again offers no support for this supposition. In the past, the Commission has established designated entity credits where it appeared that large business would outspend small business in spectrum auctions and thereby dominate the auctioned service.¹⁵ But here, the Commission does not even discuss the issue.

Is the Commission suggesting that designated entity provisions are keeping large businesses away from unserved tribal areas, and that only large businesses can accommodate the needs of residents in those areas? Such a conclusion lacks support and is counterintuitive. The Commission itself has acknowledged the innovative force of small business.¹⁶

As the Commission points out, high costs have prevented the laying of cable to low-

¹⁴ See Federal Communications Commission, *Auction of Wireless Communications Service Raises \$45,064,450*, May 12, 1999.

¹⁵ See, e.g., *LMDS Second R&O*, para. 356.

¹⁶ See, e.g., *LMDS Second R&O*, para. 348.

income, sparsely populated areas.¹⁷ But high costs affect both small and large businesses; cost and revenue judgments influence any company's decision to provide or not provide a good or service. While cost issues may impact small business more than large business, it is not a factor that uniquely affects small business. If filling a consumption demand makes sense from a revenue standpoint, then small businesses, just like large businesses, will step into the market.

The Commission's rules should promote cost-effective use of wireless spectrum to provide fixed telephony. The Commission should not act to cut small business from segments of the wireless local loop market without real evidence of small business incapacity to serve that market. The Commission should not simply presume such incapacity exists based merely on the premise that large business resources exceed small business resources.

2. The Commission's IRFA Does Not Discuss the Regulatory Impact on Small Entities Nor Does it Propose Alternatives Designed to Minimize the Impact.

The Commission does not discuss the significant economic impact its proposal may have on small business nor does it propose alternatives that might minimize this impact, as is required by the RFA.¹⁸ The Commission runs through its usual litany, vaguely listing numbers of small businesses that might fall within the ambit of its rules. But the Commission offers no analysis of what impact its proposed rules might have. And some of this impact is obvious. For example, the Commission proposes to eliminate designated entity transfer restrictions and proposes to offer bidding credits in future auctions regardless of business size. These proposals would tend to ensure that wireless licenses for tribal lands go to large business, and discourage small business participation in this segment of the wireless market. But the Commission offers no discussion of this impact. The Commission produces its "boilerplate" list of licensee numbers

¹⁷ *NPRM*, para. 4.

¹⁸ 5 U.S.C. § 603(c).

without a single sentence of analysis.

The Commission also fails to propose a single alternative that would bring local phone service to tribal lands with minimal impact on small business.¹⁹ The Commission lists the general alternatives its NPRM discussed, but none of these contemplate minimizing impact on small business. In fact, the Commission lists its designated entity proposals among its “IRFA alternatives”, even though these would *impose burdens* on small business, not minimize them.

The RFA requires the Commission to propose at the least four enumerated alternatives: (1) different compliance requirements or timetables, (2) clarification, consolidation, or simplification of compliance requirements, (3) use of performance rather than design standards, and (4) exemption – either in whole or in part – for small entities.²⁰ The Commission does not propose or analyze a single one of these alternatives and proposes none of its own. Thus, the Commission does not *propose or analyze* alternatives, as required by law.²¹

For these reasons, the Commission does not conduct a sufficient IRFA; it should promulgate no rules in this proceeding until it has analyzed the significant impact its proposals might have on small business and until it has proposed alternatives designed to minimize this impact while serving the Commission’s regulatory goals.

Conclusion

The Commission’s proposed changes to its designated entity provisions risk driving small and local wireless businesses from tribal lands and other areas not reached by basic telephony. The Commission identifies the serious problem that some rural and tribal residents lack access to vital communications. But the Commission concludes, without support, that designated entity

¹⁹ The Commission does invite commenters to propose alternatives that would minimize impact on small business but this amounts to asking commenters to conduct the Commission’s IRFA. *See NPRM*, Appendix, para. 35.

²⁰ 5 U.S.C. § 603(c)(1)-(4).

²¹ *See* 5 U.S.C. § 603(c).

provisions contribute to this problem and that small wireless businesses are unable to provide these services. The Commission fails to identify and discuss the unintended regulatory impact its rules may place on small entities and proposes no alternatives to minimize this impact.

This rulemaking threatens to eliminate small and local companies from segments of the wireless market. But if left on a level playing field, small business can help provide innovative ways to bring basic telephony and other communications services to Americans who lack these services.

Respectfully submitted,

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